Supreme Court, U.S
FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

PETER T. MYERS,

Petitioner,

v.

AMERICAN SOCIETY OF COMPOSERS, ACTORS, AND PUBLISHERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

LEONARD J. COMDEN, ESQ. (COA Bar No. 85-225)
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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Second Circuit had the authority to summarily dismiss the petitioner's appeal, thus denying the petitioner his right to appeal, merely because petitioner did not timely file two administrative forms, "C" and "D."

Whether the United States Court of Appeals for the Second Circuit erred by denying petitioner's motion to reinstate the appeal, and to file forms "C" and "D" late, where petitioner had complied with the court of appeals' own rules for reinstatement of an appeal and had demonstrated that his failure to timely file forms "C" and "D" in a timely fashion was not willful.

Whether the United States Court of Appeals for the Second Circuit's summary dismissal of petitioner's appeal, followed by its denial of petitioner's motion to reinstate the appeal, violated Federal Rule of Appellate Procedure 47(a)(2), which expressly prohibits district courts from enforcing any local rule in a manner which results in a party losing rights for nonwillful violations.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court of appeals were Appellant/Petitioner Peter T. Myers and Appellee, American Society of Composers, Authors and Publishers.

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OTHER AUTHORITIES

Second Circuit Handbook, "Everything You Wanted to Know About the Second Circuit," found at http://www.ca2.uscourts.gov 6

ORDERS/OPINIONS

The order, signed by the court of appeals' "deputy clerk," dismissing petitioner's appeal, was issued in the case of *American Society of Artists, Composers and Musicians v. Peter T. Myers*, Docket No. 03-6137, and is set forth in the attached Appendix. The order of the court of appeals denying petitioner's motion to reinstate the appeal, which is signed by the court of appeals' "motions staff attorney," was issued in the same case, Docket No. 03-6137, and is set forth in the attached Appendix. Neither orders were reported.

JURISDICTION

The order of the court of appeals dismissing the appeal was entered on November 18, 2003. The order denying petitioner's motion for reconsideration, rehearing, and to reinstate the appeal was denied on February 18, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND RULES INVOLVED

Federal Rules of Appellate Procedure, Rule 3, provides in part:

"Rule 3. Appeal as of Right – How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice

of appeal with the clerk of the district court within the time allowed by Rule 4. . . . "

Federal Rules of Appellate Procedure, Rule 4(a)(1) provides:

"Rule 4. Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted."

Federal Rules of Appellate Procedure, Rule 26(b) provides:

"(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to

enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law."

Federal Rules of Appellate Procedure, Rule 47 provides:

"Rule 47. Rules of a Court of Appeals

(a) Local Rules.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to a party or a lawyer regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with – but not duplicative of – Acts of Congress and rules adopted under 28 U.S.C. 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The clerk of each court of appeals must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedure When There Is No Controlling Law. – A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of

the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement."

STATEMENT OF THE CASE

The district court based its jurisdiction on 28 U.S.C. §1331, 9 U.S.C. §§1, *et seq.*, and an order of the district court entered on January 7, 1960, as amended. The court of appeals had jurisdiction under 28 U.S.C. §1291.

This petition concerns whether the *Federal Rules of Appellate Procedure*, Rules 26(b), 47 *et seq.*, 28 U.S.C. §1928, and the controlling precedent of this Court, permitted the court of appeals to summarily dismiss petitioner's appeal because he failed to timely file two administrative forms required by the court of appeals' "Civil Appeal Management Plan" (hereinafter "court of appeals Management Plan"). This petition also concerns whether the court of appeals may properly deny a motion to *reinstate the appeal* for non-willful violations of the Management Plan.

Petitioner, Peter T. Myers, timely filed his notice of appeal. He also, in accordance with the Federal Rules of Appellate Procedure and requirements of the court of appeals, submitted a copy of the opinion of the district court, Notice of Appeal acknowledgment letter, and paid the applicable docketing fee.

However, he did not timely file the forms "C" and "D" required by the court of appeals' Management Plan. The

court of appeals, therefore, summarily dismissed the appeal. A terse order signed by the "deputy clerk" stated, in part: "The appellant herein not having so proceeded, upon consideration thereof, it is ordered that the appeal from the order of 6/4/03 United States District Court for the SDNY/nyny be and it hereby is dismissed."

Peter Myers, as authorized by the court of appeals' procedures, filed a motion to reinstate the appeal along with the two *completed* forms. He demonstrated that the failure to timely file the forms was unintentional. In his motion, he stated: "The forms were not filed because the deadline to file forms C and D were not calendered by Appellant's counsel. The failure to file forms C and D was inadvertent and the result of excusable neglect." Further, he noted no party was prejudiced by the untimely filing. This was especially true as to form "D" – a statement concerning the filing of the proceedings from the court reporter – since there were no oral arguments at the district court level.

The court of appeals' own procedures authorized petitioner's motion. Thus,

> "Appeals dismissed for failure to timely file Forms C, C-A or D may be reinstated on motion to reinstate, which must also include a motion to file the appropriate forms out of time and be accompanied by the completed forms.
>
> "Motions to reinstate that are filed 30 days or less from the date of dismissal are decided by Staff Counsel; those filed after that date are decided by a judge."

See, Second Circuit Handbook, "Everything You Wanted to Know About the Second Circuit," found at http://www.ca2.uscourts.gov.

The appellee opposed the motion. The appellee essentially argued that petitioner's appeal lacked merit and that petitioner had failed to show that his failure to timely file the forms was the result of "excusable neglect."

Shortly thereafter, the court of appeals **denied** petitioner's motion, without explanation or comment. In so doing, the court of appeals exceeded its authority under Rule 47(a)(2), abused its discretion under Rule 26(b), and effectively denied petitioner his right to appeal conferred by 28 U.S.C. §1928. The orders of the court of appeals warrant this Court's review.

REASONS FOR GRANTING THE PETITION AND ARGUMENT

The decision of the court of appeals departs from the consistent decisions of this Court which accord federal civil litigants one appeal of a final judgment from the district court as a matter of right. By summarily dismissing the petitioner's appeal, and then denying petitioner's motion for reinstatement, the court of appeals prevented an appellate review of his claim on the merits. The court of appeals' actions can only be characterized as punitive.

The court of appeals violated Rule 47(a)(2) of the Federal Rules of Appellate Procedure. Rule 47(a)(2) prohibits the courts of appeals from "imposing a requirement of form . . . [which] . . . causes a party to lose rights because of a nonwillful failure to comply with the

requirement." In enacting Rule 47(a)(2), Congress sought to avoid the harm to appellants which results from their losing their right to appeal due to the nonwillful failure to comply with administrative, non-jurisdictional rules imposed by the court of appeals. Due to the decision below, every appellant who comes before the court of appeals may fall into the same trap for the unwary. In fact, there was no reasonable dispute that petitioner's failure to file Forms C and D was unwillful. Petitioner timely filed a notice of appeal (FRAP 3, 4), paid the court docketing fee, and filed all other forms required by the court of appeals. After the court of appeals' clerk dismissed his appeal, petitioner filed a motion, supported by an affidavit, to reinstate the appeal. And, in compliance with the court of appeal's requirements, he also submitted *completed* Forms C and D. In contravention to the clear mandate of Rule 47(a)(2), however, the court of appeals denied the motion without explanation.

Rule 26(b) of the Federal Rules of Appellate Procedure provides that the court of appeals "for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal." In his motion to reinstate the appeal, petitioner invoked the provisions of Rule 26(b), requesting that the court of appeals enlarge the time for him to file Forms C and D. This request did not involve enlarging the time for filing a notice of appeal, etc. Petitioner also submitted completed copies of the forms C and D for filing. In denying petitioner's request for more time, the court of appeals exercised no discretion; it merely summarily denied the

motion to reinstate the appeal without comment or explanation.

The court of appeals' decision fails for another reason – it effectively denied petitioner his right to appellate review of the final district court's judgment. This Court has consistently recognized that in federal court practice, litigants are entitled to one appeal after a final judgment. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994).

Section 1298 of Title 28 of the United States Code provides, in pertinent part, that the "court of appeals . . . shall have jurisdiction from all final decisions of the district court of the United States. . . . " 28 U.S.C. §1298. As Justice Souter wrote in *Digital Equipment Corp., supra*, this Court has "repeatedly held that the statute *entitles* a party to appeal . . . from a district court decision that 'ends the litigation on the merits and leaves nothing more for the court to do but to execute the judgment." *Id.*, emphasis added, citing *Catlin v. United States*, 324 U.S. 229, 233 (1945). By summarily dismissing the appeal and then denying petitioner's motion to reinstate the appeal, the court of appeals side-stepped Section 1298 and effectively denied petitioner his right to appellate review of the district court's judgment.

In sum, the petition for writ of certiorari should be granted because the court of appeals so departed from the acceptable and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Further, the court of appeals, contrary to this Court's prior decisions, denied petitioner his right to one appeal of a final judgment. In enforcing its own "Management Plan," the court of appeals concluded that it may dismiss an

appeal, and refuse to reinstate an appeal, for non-willful violations of its own internal rules. Whether it is proper for appellate courts to do so is an important question of federal law. Finally, the issues to be decided by this petition raise exceptionally important questions concerning the discretion of the appellate courts to enact "Management Plans" which impact upon the rights of all appellants.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: May 18, 2004

Respectfully submitted,

WASSERMAN, COMDEN,
CASSELMAN & PEARSON L.L.P.

LEONARD J. COMDEN
Attorneys for Petitioner
Peter T. Myers

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

DC: NDNY/nyny
DC DKT # 41-cv-1395
DC Judge: Conner

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18 day of November two thousand three.

USA, Docket No. 03-6137

v.

American Society, (Filed Nov. 18, 2003)

The Civil Appeal Management Plan of this Court Directs that within the (10) days after filing a Notice of Appeal, the Appellant shall file and serve a Pre-Argument Statement (FORM C), order a transcript of the proceedings from the court reporter and file and serve a statement concerning same (FORM D), pay docketing fee, and, that in the event of default of any of these requirements, the Clerk may dismiss the appeal without further notice.

The appellant herein not having so proceeded,
upon consideration thereof, it is
ordered that the appeal from the order of 6/4/03
United States District Court for the SDNY/nyny
be and it hereby is dismissed.

ROSEANN B. MACKECHNIE,
Clerk

By: /s/ Michael Adragna
Michael Adragna
Deputy Clerk, USCA

A TRUE COPY,
Roseann B. MacKechnie,
CLERK

by /s/ Michael Adragna
DEPUTY CLERK

APPENDIX B

MOTION INFORMATION STATEMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse
at Foley Square
40 Centre Street, New York, NY 10007
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

(Filed Jan. 29, 2004)

Docket Number(s): 03-6137

Motion for: Order to Reinstate Appeal; Reconsideration, etc.

Caption [use short title]

United States of America,
Plaintiff,

vs.

American Society of Composers, Authors and Publishers,
Defendant.

Set forth below precise, complete statement of relief sought:

To reinstate appeal that was dismissed because Forms C and D were not timely filed, and order permitting late filing of forms.

MOVING PARTY: Peter T. Myers

☐ Plaintiff ☐ Defendant
☒ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Leonard J. Comden, Esq.
[name of attorney, with firm, address, phone number and e-mail]

Alan I. Cyrlin/Leonard J. Comden
Wasserman, Comden, Casselman & Pearson LLP
5567 Reseda Boulevard, Suite 330
Tarzana, CA 91357-7033
acyrlin@wccplaw.com/lcomcden@wccplaw.com
(818) 705-6800

OPPOSING PARTY: American Society of Composers, Authors and Publishers

OPPOSING ATTORNEY [Name]: Richard H. Reimer, Esq.
[name of attorney, with firm, address, phone number and e-mail]

Richard Reimer
ASCAP Building
One Lincoln Plaza
New York, NY 10023
rreimer@ascap.com
(212) 621-6261

Court-Judge/Agency appealed from: U.S. District Court, Southern Distict [sic] of New York

Please check appropriate boxes:

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

B. been obtained? ☐ Yes ☒ No

Is oral argument requested? ☐ Yes ☒ No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?
☐ Yes ☒ No

If yes, enter date _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?
☐ Yes ☐ No

Has this relief been previously sought in this Court?
☐ Yes ☐ No

Requested return date and explanation of emergency:

Signature of Moving Attorney:

/s/ Alan J. Cyrlin Date: 1/27/2004
Alan Cyrlin

Has service been affected? ☒ Yes ☐ No
[Attach proof of service]

ORDER

(Filed Feb. 13, 2004)

Before: Hon. Rosemary S. Pooler, *Circuit Judge*

IT IS HEREBY ORDERED that the motion be and it hereby is DENIED.

FOR THE COURT
Roseann B. MacKechnie, Clerk
by
/s/ Laura Bass Penn
Laura Bass Penn, Motions
Staff Attorney

_____
Date

APPENDIX C

MOTION INFORMATION STATEMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse
at Foley Square
40 Centre Street, New York, NY 10007
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 03-6137

Motion for: Order to Reinstate Appeal; Reconsideration, etc.

Caption [use short title]

United States of America,
Plaintiff,

vs.

American Society of Composers, Authors and Publishers,
Defendant.

Set forth below precise, complete statement of relief sought:

To reinstate appeal that was dismissed because Forms C and D were not timely filed, and order permitting late filing of forms.

MOVING PARTY: Peter T. Myers

☐ Plaintiff ☐ Defendant
☒ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Leonard J. Comden, Esq.
[name of attorney, with firm, address, phone number and e-mail]

Alan I. Cyrlin/Leonard J. Comden
Wasserman, Comden, Casselman & Pearson LLP
5567 Reseda Boulevard, Suite 330
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acyrlin@wccplaw.com/lcomcden@wccplaw.com
(818) 705-6800

OPPOSING PARTY: American Society of Composers, Authors and Publishers

OPPOSING ATTORNEY [Name]: Richard H. Reimer, Esq.
[name of attorney, with firm, address, phone number and e-mail]

Richard Reimer
ASCAP Building
One Lincoln Plaza
New York, NY 10023
rreimer@ascap.com
(212) 621-6261

Court-Judge/Agency appealed from: U.S. District Court, Southern Distict [sic] of New York

Please check appropriate boxes:

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

B. been obtained? ☐ Yes ☒ No

Is oral argument requested? ☐ Yes ☒ No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?
☐ Yes ☒ No

If yes, enter date _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?
☐ Yes ☐ No

Has this relief been previously sought in this Court?
☐ Yes ☐ No

Requested return date and explanation of emergency:

Signature of Moving Attorney:

/s/ Alan J. Cyrlin Date: 1/27/2004
Alan Cyrlin

Has service been effected? ☒ Yes ☐ No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk of Court

Date: _____

By: _____

PROOF OF SERVICE
Myers v. ASCAP
BS079226

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of LOS ANGELES, STATE OF CALIFORNIA. My business address is: 5567 Reseda Boulevard, Suite 330, Post Office Box 7033, Tarzana, California 91357-7033. I am over the age of 18 years and am not a party to this action.

On January 27, 2004, I served the following document(s) entitled **MOTION INFORMATION STATEMENT** on ALL INTERESTED PARTIES in this action:

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** By placing a true copy thereof in a sealed envelope addressed as above, and placing it for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings, and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in Tarzana, California, on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY OVERNIGHT COURIERS:** I caused the above-referenced document(s) to be delivered to ___ for delivery to the above address(es).

☐ **BY FAX:** I transmitted a copy of the foregoing document(s) this date via telecopier to the facsimile numbers shown above.

☐ **BY PERSONAL SERVICE:** I served such envelope to be delivered by hand to the offices of the addressee(s).

☐ [State] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ [Federal] I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 27, 2004, at Tarzana, California.

/s/ Colleen Pinoski
COLLEEN PINOSKI

SERVICE LIST

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APPENDIX D

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Attorneys for Appellant/Movant,
PETER T. MYERS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, vs. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Defendant.	: Docket No. 03-6137 : : NOTICE OF MOTION AND MOTION BY APPELLANT PETER T. MYERS FOR AN ORDER: (1) TO RECONSIDER ORDER DISMISSING THE APPEAL, (2) TO REINSTATE THE APPEAL AND (3) EXTENDING THE TIME TO FILE FORMS C AND D : DECLARATION OF ALAN I. CYRLIN AND EXHIBITS IN SUPPORT THEREOF

---------- x
AMERICAN SOCIETY OF :
COMPOSERS, AUTHORS :
AND PUBLISHERS, :

Applicant/
Appellee,

vs.

PETER T. MYERS, :

Respondent/ :
Appellant. :
---------- x

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Peter T. Myers, the appellant, moves the Court for an order (1) to reconsider its order dismissing his appeal, (2) to reinstate the appeal, and (3) extension of time to file forms C and D.

Appellant timely filed his appeal on June 20, 2003. The Appellant also timely paid the required docketing fee, and timely filed the Notice of Acknowledgment letter. However, his appeal was dismissed on November 18, 2003, because forms C and D were not timely filed. The forms were not filed because the deadline to file forms C and D were not calendered [sic] by Appellant's counsel. The failure to file forms C and D was inadvertent and the result of excusable neglect. (See Cyrlin Decl., ¶¶ 2, 3, 5, 7).

This Court has the power to reinstate the appeal.

> **"Appeals dismissed for failure to timely file Forms C, C-A or D may be reinstated on motion to reinstate, which must also include a**

motion to file the appropriate forms out of time and be accompanied by the completed forms.

"Motions to reinstate that are filed 30 days or less from the date of dismissal are decided by Staff Counsel; those filed after that date are decided by a judge."

See, Second Circuit Handbook, "Everything You Wanted to Know About the Second Circuit," found at http://www.ca2.uscourts.gov; L.R., Rule 2 ("On its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)"); L.R., Rule 26 ("For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires.")

In the present case, the Appellant has compiled with all the requirements for reinstatement of his appeal. He has moved to reinstate his appeal and to file forms C and D out of time, and has explained the reasons for his failure to timely file the forms. The completed forms C and D are accompanying this motion. (Cyrlin Decl., ¶ 5). See also Exhibit 2). No Prejudice to Appellee's will occur if the appeal is reinstated so that the appeal may be decided on the merits. (Cyrlin Decl., ¶ 6). In fact, the failure to file Form D was harmless, since to [sic] transcripts can be ordered because the District Court conducted the entire proceedings without hearings or oral arguments. (Cyrlin Decl., ¶ 7). Appellant's counsel did not become aware that the appeal had been dismissed until late January 2004. (*Id.* ¶ 3). Upon learning of the dismissal, Appellant's counsel promptly requested that Appellee's counsel

stipulate to reinstating the appeal (*Id.* ¶ 4, Exhibit 1). Appellee did not respond. (Cyrlin Decl., ¶ 4). Appellant then promptly prepared and filed this motion. No prior motions to reinstate the appeal has been filed by Applicant, nor has Appellant previously requested any extensions of time.

For all the foregoing reasons, Appellant Peter T. Myers respectfully requests that the relief sought herein be granted.

DATED: January 27, 2004

WASSERMAN, COMDEN,
CASSELMAN & PEARSON L.L.P.

By: /s/ Alan I. Cyrlin
ALAN I. CYRLIN
Attorneys for Appellant/Movant,
PETER T. MYERS

DECLARATION OF ALAN I. CYRLIN

I, ALAN I. CYRLIN, declare:

1. I am member of the law offices of Wasserman, Comden, Casselman & Pearson, LLP, ("WCCP") attorneys for appellant Peter T. Myers. I am personally familiar with the facts set forth in this declaration. If called as a witness I could and would competently testify to the matters stated herein.

2. Peter Myers timely filed his appeal on June 20, 2003. Appellant also filed his appeal, paid the required docketing fee, and timely filed the Notice of Acknowledgment letter.

3. The matter was placed on WCCP's calendar, but the deadline to file forms C and D were not calendered. An order dismissing Mr. Myers' appeal was apparently issued on November 18, 2003, because forms C and D were not filed. I did not become aware of the dismissal until the middle or late January 2004, when ASCAP's attorney advised us of the dismissal.

4. On January 26, 2004, I sent a letter to opposing counsel for ASCAP requesting that they consent to an order reinstating the appeal and permitting the late filing of forms C and D. (A true and correct copy of my January 26, 2004 letter is attached hereto as Exhibit "1" and is incorporated by this reference.). I did not receive a positive response.

5. The failure to file forms C and D were inadvertent and the result of excusable neglect. Copies of the completed forms C and D are accompanying this motion. Copies of the completed forms are also attached hereto as Exhibit "2" and are incorporated by this reference.

6. I know of no prejudice to Appellees if the appeal is reinstated.

7. The failure to file Form D was harmless, since to [sic] transcripts can be ordered because the District Court conducted the entire proceedings without hearings or oral arguments.

I declare under penalty of perjury under the laws of the State of California and the United States of American [sic] that the foregoing is true and correct.

Executed on January 27, 2004, at Tarzana, California.

/s/ Alan I. Cyrlin
ALAN I. CYRLIN

EXHIBIT 1

Law Offices
WASSERMAN, COMDEN, CASSELMAN & PEARSON
L.L.P.
5567 RESEDA BOULEVARD
SUITE 330
POST OFFICE BOX 7033
TARZANA (LOS ANGELES), CALIFORNIA 91357-7033
(818) 705-6800 (323) 872-0995
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[Names and Addresses Omitted In Printing]

January 26, 2004

By Fax & Mail
(212) 787-1381
Richard H. Reimer, Esq.
ASCAP Building
One Lincoln Plaza
New York, New York 10023

By Fax Only
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John J. Quinn, Esq.
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By Fax Only
(212) 206-4329
Ross J. Charap, Esq.
MOSES & SINGER LLP
1301 Avenue of the
Americas
New York, New York
10019-6076

Re: Case : *Myers v. ASCAP / USCA Docket No.: 03-6137*
Our File No. : 2844-1

Dear Counsel:

This letter is written to request that ASCAP consent to an order reinstating Mr. Myers' appeal and permitting Mr. Myers to file Forms C and D late. Please let me [sic] whether ASCAP will consent to the order.

Thank you for your attention to this matter.

Very truly yours,
WASSERMAN, COMDEN, CASSELMAN & PEARSON L.L.P.
/s/ Alan I. Cyrlin
Alan I. Cyrlin

cc: Leonard J. Comden, Esq

WASSERMAN, COMDEN, CASSELMAN & PEARSON L.L.P.

5567 Reseda Boulevard, Suite 330
Post Office Box 7033
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Date: January 26, 2004 **Client/Matter:** Myers v. ASCAP

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Kurt Fritz, Esq	ARNOLD & PORTER	(213) 243-4000	(213) 243-4199
Richard H. Reimer, Esq.	ASCAP	(212) 621-6261	(212) 787-1381
Ross J. Charap, Esq.	MOSES & SINGER, LLP	(212) 554-7829	~~(917)~~ 206-4329

From: Alan Cyrlin

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** JOB STATUS REPORT AS OF JAN 26 2[illegible] 12:35 PM PAGE. 01

WASSERMAN COMDEN

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	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	1/26	12:27P	12132434199	EC--S	00'54"	003	OK
002		12:29P	212 787 1381	EC--S	00'21"	003	OK
003		12:31P	12152434166	EC--S	00'00"	000	NA
004		12:34P	12122064329	EC--S	00'00"	000	NA

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Ross J. Charap, Esq.	MOSES & SINGER, LLP	(212) 554-7829	~~(914)~~ 206-4329 (212)

From: Alan Cyrlin

Total number of pages including cover page: 3

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FAX NUMBER: 8187058634

DATE: 26-JAN-04
TIME: 14:52

DATE	TIME		REMOTE FAX NAME AND NUMBER
26-JAN	14:50	S	12132434199

DURATION	PG	RESULT	DIAGNOSTIC
0:01:17	3	OK	663840100100

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LAST TRANSACTION REPORT FOR HP FAX-700 SERIES

VERSION: 01.02

FAX NAME: LEONARD COMDEN/GERI
FAX NUMBER: 8187058634

DATE: 26-JAN-04
TIME: 15:40

DATE	TIME		REMOTE FAX NAME AND NUMBER
26-JAN	15:39	S	19172064329

DURATION	PG	RESULT	DIAGNOSTIC
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EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT CIVIL APPEAL
PRE-ARGUMENT STATEMENT

1. SEE NOTICE ON REVERSE
2. PLEASE TYPE OR PRINT.
3. ATTACH ADDITIONAL PAGES IF NECESSARY.

Title of Case:
United States of America,
Plaintiff

v.

American Society of Composers, etc.
Defendants

District or Agency
U.S. District Court

Judge
William C. Conner

Date Filed in District Court or Agency
Nov. 27, 2002

District Court Docket No.
41-1395 (WCC)

Date Notice of Appeal Filed
6/20/2003

Is this a Cross Appeal?
☐ Yes ☒ No

Attorney(s) for
Peter T. Myers

Name
Leoard [sic] J. Comden

Address
5567 Reseda Blvd. #330
Tarzana, CA 91357

Telephone No.
(818) 705-6800

Appellant
☐ Plaintiff
☒ Defendant
Peter T. Myers

Appellee
☒ Plaintiff
☐ Defendant
American Society of Composers, Authors, and Publishers

Has Transcript Been Prepared?
No.

Approximate Number of Transcript Pages -

Number of Exhibits

Has this matter been before this Court previously?
☐ Yes x☒ No

If Yes, state
Case Name:
Docket No.: Citation:

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

ASCAP moved to confirm an arbitration order and Peter Myers moved to vacate the order.

ISSUES PROPOSED TO BE RAISED ON APPEAL:

Did the District err in affirming an arbitration award if favor of ASCAP, even though the "arbitrators" hired ASCAP's attorneys to advise the arbitrators during the arbitration hearing, and the attorneys participated in the hearing, and even though the arbitration order contradicted the plain language of its own

Weighting Rues and Various Consent Decrees? Further, did the U.S. District Court have jurisdiction?

A. JURISDICTION

1. Federal

☒x U.S. a party
☒x Federal question (U.S. not a party)
x☒ Diversity
☐ Other (specify): _____

2. Appellate

☒x Final Decision below
☐ Interlocutory decision ____ appealable as of right
☐ Order Certified by District Judge (specify): _____
☐ Other (specify): _____

B. DISTRICT COURT DISPOSITION
(Check as many as apply)

1. Stage of Proceedings

☐ Pre-trial
☐ During trial
☐ After trial

2. Type of Judgment/Order Appealed

☐ Default judgment
☐ Dismissal/jurisdiction
☐ Dismissal/merit
☐ Summary judgment
☐ Declaratory judgment
☒x Judgment/court decisions
☐ Jury verdict
☐ Judgment NOV
☐ Directed verdict
☒ Other (specify)
Order confirming Arbitration Award.

3. Relief

☒x Damages: N/A

___ Sought: $ ___
___ Granted:
___ Denied: $ ___

x☒ Injunctions N/A

___ Preliminary
___ Permanent
___ Granted
___ Denied

C. NATURE OF SUIT (Check as many as apply)

1. Federal Statutes

☐ Antitrust
☐ Bankruptcy
☐ Banks/Banking
☐ Civil Rights
☐ Commerce, routes
☐ Commodities
☐ Communications
☐ Consumers Protection
☐ Copyright ☐ Patent
☐ Trademark
☐ Election
☐ Energy
☐ Environmental
☐ Freedom of Information
☐ Immigration
☐ Labor
☐ OSHA
☐ Securities
☐ Soc. Security
☐ Tax
☐ Other (specify):

_____
_____

2. Torts

- ☐ Admiralty/Maritime
- ☐ Assault/Defamation
- ☐ FELA
- ☐ Product Liability/Warranty
- ☐ Other (Specify):

_____

_____

3. Contracts

- ☐ Admiralty/Maritime
- ☐ Arbitration
- ☐ Commercial
- ☐ Employment
- ☐ Insurance
- ☐ Negotiable Instruments
- ☐ Other (Specify):

_____

_____

4. Prisoner Petitions

- ☐ Civil Rights
  Habeas Corpus
  ___ 2254
  ___ 2255
- ☐ Mandamus
- ☐ Parole
- ☐ Vacate Sentence
- ☐ Other

_____

_____

5. Other

- ☐ Forfeiture/Penalty
- ☐ Real Property
- ☐ Treaty (specify): _____
- ☐ Other (specify): _____

6. General

☒x Arbitration
☐ Attorney Disqualification
☐ Class Action
☐ Counsel Fees
☐ Shareholder Derivative
☐ Transfer

7. Will appeal raise constitutional issue? x☒ Yes ☐ No

Will appeal raise a matter of first impression? x☒ Yes ☐ No

Is any matter relative to this case pending below?

☐ Yes ☒ No (specify):

To your knowledge, is there any case now pending or about to be brought before this Court or any other court or administrative agency which

(A) arises from substantially the same case or controversy as this appeal? ☒x Yes ☐ No

(B) involves an issue that is substantially the same, similar or related to an issue in this appeal? ☒x Yes ☐ No

If "YES", state whether ☐ "A" or ☐ "B" or ☐ "Both" and provide:

Case Name:

MYERS v. ASCAP

Docket No.

N/A

Citation:

LASC/BS 079226

Court or Agency:

Los Angeles Superior Ct.

Name of Appellant

Peter T. Myers

Date: 1/27/2004

Signature of Counsel of Record /s/ [Illegible]

NOTICE TO COUNSEL

Once you have filed your Notice of Appeal with the District Court or the Tax Court and have paid the $5 filing fee, you have only ten (10) days in which to docket your appeal. You must take the following steps within those ten (10) days:

1. Complete this Civil Appeal Pre-Argument Statement (Form C); serve it upon all parties, and file it with the Clerk of the Court of Appeals,

2. File the Court of Appeals Transcript Information/Civil Appeal (Form D) with the Clerk of the Court of Appeals,

3. ***Pay the $100 docketing fee to the Clerk of the United States District Court***, unless you are authorized to prosecute the appeal without payment.

IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN TEN (10) DAYS, YOUR APPEAL WILL BE DISMISSED,
(NOTE: THIS FORM IS NOT REQUIRED OF NON-ATTORNEY *PRO SE* LITIGANTS,)
SEE THE CIVIL APPEALS MANAGEMENT PLAN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

NOTICE CONCERNING DISCLOSURE OF INTERESTED PARTIES

Rule 0.15 of the local rules of this Court supplementing the Federal Rules of Appellate Procedure provides as follows:

> **0.15 Disclosure of Interested Parties.**
>
> To enable the judges of the court to evaluate possible disqualification, counsel for all private (nongovernment) parties, in an appeal, or in a motion or other proceeding related to an appeal, shall in all cases submit when such party's initial brief is due, or upon request of the Clerk, an identification of any corporate parent of the party.

FORM C
October 2002

Form D (for Civil Appeals)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TRANSCRIPT INFORMATION CIVIL APPEAL	**To be completed by counsel for appellant in civil appeal from district court with in ten days after filing notice of appeal.**

THIS SECTION TO BE COMPLETED BY COUNSEL FOR APPELLANT

CASE TITLE
ASCAP
v.
MYERS

DISTRICT
New York

DOCKET NUMBER
03-6137

JUDGE
William C. Conner

APPELLANT
Peter T. Myers

COURT REPORTER
N/A

COUNSEL FOR APPELLANT
Peter T. Myers

TRANSCRIPT ORDER – Must be completed

DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATES).

I am ordering a transcript.
I am not ordering a transcript Reason:

☐ Daily copy is available

☒ Other – Attach explanation

No Court hearings occurred.

METHOD OF PAYMENT

☐ Funds ☐ CJA Voucher (CJA 21)

☐ PREPARE TRANSCRIPT OR PRE-TRIAL PROCEEDINGS

☐ PREPARE TRANSCRIPT OF TRIAL

☐ PREPARE TRANSCRIPT OF OTHER POST-TRIAL PROCEEDINGS

☐ PREPARE (Other: Specify)

DELIVER TRANSCRIPT TO:

(NAME, ADDRESS, TELEPHONE)

I certify that I have made satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)). I understand that unless I have already ordered the transcript, I shall order its preparation at the time required by the Civil Appeals Management Plan, F.R.A.P. and the local rules.

COUNSEL'S SIGNATURE

/s/ [Illegible]

DATE

1/27/2004

COURT REPORTER ACKNOWLEDGMENT

(To be completed by court reporter. Return one copy to: Clerk of Court, U.S. Court of Appeals, Second Circuit)

DATE ORDER RECEIVED

ESTIMATED COMPLETION DATE

ESTIMATED NUMBER OF PAGES

SIGNATURE OF COURT REPORTER

DATE

PROOF OF SERVCE
Myers v. ASCAP
BS079226

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I AM EMPLOYED IN THE County of LOS ANGELES STATE OF CALIFORNIA. My business address is: 5567 Reseda Boulevard, Suite 330, Post Office Box 7033, Tarzana, California 91357-7033. I am over the age of 18 years and am not a party to this action.

On January 27, 2004, I served the following document(s) entitled **NOTICE OF MOTION AND MOTION BY APPELLANT PETER T. MYERS FOR AN ORDER: (1) TO RECONSIDER ITS ORDER DISMISSING THE APPEAL, (2) TO REINSTATE THE APPEAL AND (3) EXTENDING THE TIME TO FILE FORMS C AND D; DECLARATION OF ALAN I. CYRLIN; AND EXHIBITS IN SUPPORT THEREOF** on ALL INTERESTED PARTIES in this action:

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** By placing a true copy thereof in a sealed envelope addressed as above, and placing it for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings, and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in Tarzana, California, on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage

meter date is more than one day after date of deposit for mailing in affidavit.

☐ BY OVERNIGHT COURIER: I caused the above-referenced document(s) to be delivered to _____ for delivery to the above address(es).

☐ **BY FAX:** I transmitted a copy of the foregoing document(s) this date via telecopier to the facsimile numbers shown above.

☐ **BY PERSONAL SERVICE:** I served such envelope to be delivered by hand to the offices of the addressee(s).

☐ [State] I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ [Federal] I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 27, 2004, at Tarzana, California.

/s/ Colleen Pinoski
COLLEEN PINOSKI

SERVICE LIST

John J. Quinn, Esq.
Kurt Fritz, Esq.
ARNOLD & PORTER
777 So. Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844

Ross J. Charap, Esq.
MOSES & SINGER LLP
1301 Avenue of the Americas
New York, New York 10019-6076

Richard H. Reimer, Esq.
ASCAP Building
One Lincoln Plaza
New York, New York 10023

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America, Plaintiff, -against- American Society of Composers, Authors and Publishers Defendant.	41 Civ. 1395 (WCC) **AMENDED OPINION AND ORDER** **Supplanting Opinion And Order dated May 16, 2003**
American Society of Composers, Authors and Publishers, Applicant, -against- Peter T. Myers, Respondent.	

APPEARANCES:

American Society of Composers, Authors and Publishers
Attorneys for Applicant
One Lincoln Plaza
New York, NY 10023

Richard H. Reimer, Esq.

Moses & Singer LLP
Attorneys for Applicant
1301 Avenue of the Americas
New York, NY 10019-6076

Ross J. Charap, Esq.

Wasserman, Comden, Casselman, &
Pearson LLP
Attorneys for Respondent
5567 Reseda Boulevard
Suite 330, PO Box 7033
Los Angeles, CA 91357-7033

Alan I. Cyrlin, Esq.

Conner, Senior D.J.:

Applicant American Society of Composers, Authors and Publishers ("ASCAP") brings this action pursuant to the Order entered herein on January 7, 1960 (as amended) ("1960 Order") and the Federal Arbitration Act ("FAA"), 9 U.S.C. 9.[1] ASCAP moves this Court to confirm an Arbitration Award, dated July 18, 2002, in an arbitration conducted under the auspices of the American Arbitration Association ("AAA") and to enter judgment denying the claims of ASCAP member Peter T. Myers ("Myers") against ASCAP and declaring that ASCAP properly credited performances of Myers' works in accordance with the

[1] In 1941, the Government's civil action against ASCAP for alleged violations of the Sherman Antitrust Act, was settled by the entry of a consent decree (the "1941 Consent Decree"). *See United States v. ASCAP*, 1941 Tr. Cas. (CCH) ¶ 56, 104 (S.D.N.Y. 1941). The 1941 Consent Decree was amended on March 14, 1950 (the "Amended Final Judgment" or AFJ"), and again on January 7, 1960 (the "1960 Order"). The terms of these orders regulated the manner in which ASCAP participated within the music industry and gave this Court exclusive jurisdiction under Section XVII of the AFJ to oversee the implementation of these provisions. However, the AFJ was again amended on June 11, 2001 (the "Second Amended Final Judgment" or "SAFJ") whereupon the AFJ entered on March 14, 1950, the Order entered on January 7, 1960, and all modifications and amendments thereto were vacated. The SAFJ became effective on September 11, 2001.

ASCAP Weighting Rules. For the reasons that follow, ASCAP's motion to conform the arbitration award is granted.

BACKGROUND

The matter at issue is the culmination of a dispute between ASCAP and Myers, a writer member of ASCAP, concerning the royalties paid to Myers on account of performances of his music. (App'l Mem. Supp. Confirm at 2.) Myers composed nearly 200 musical cues for episodes of a popular television series, "Diagnosis Murder." In accordance with ASCAP's distribution rules – in particular, specific provisions of the Weighting Rules and Weighting Formula attached to this Court's 1960 Order – ASCAP classified the performances of Myers' works at issue as background performances and paid royalties to Myers accordingly. (*Id.* at 2-3.) Myers subsequently advised ASCAP that the performances should have been described as "background vocal" because each piece of music had a vocal part in addition to instrumental parts. (*Id.* at 2.) The difference is important as Myers is entitled to receive a higher royalty credit if a work is classified as a "background vocal" rather than a "background instrumental." Myers claims that as a result of ASCAP's incorrect characterization, he was deprived of over $600,000 in past royalty payments. (Resp't Mem. Opp. Mot. Confirm at 5.)

ASCAP rejected Myers' view, refused to reclassify the performances as background vocal and advised Myers that it would not pay him additional royalties to which he would have been entitled if the performances at issue had been treated as feature performances under the ASCAP distribution system. (App'l Mem. Supp. Confirm at 2-3.) In

compliance with the procedures mandated by the 1960 Order, Myers first protested ASCAP's refusal to reclassify the performances of his musical cues to ASCAP's Board of Review (the "Board"), the internal peer grievance body elected by the ASCAP membership. (*Id.* at 3.) Following a plenary hearing, the Board upheld ASCAP's classification of the performances of Myers' music as background performances and concluded that ASCAP did not owe Myers any additional royalties. Myers charges that the proceeding was contaminated by conflicts of interest, improper appeals by ASCAP's counsel to the Board members' pecuniary interests, misbehavior of the Board members, the Board members' partiality, and violations by the Board of ASCAP's own procedural rules and Myers' procedural rights. (Resp't Mem. Opp. Mot. Confirm. at 6). Myers accordingly appealed to a panel of arbitrators (the "Panel") appointed by the AAA, again employing procedures prescribed by the 1960 Order. (App'l Mem. Supp. Mot. Confirm at 3.) The Panel conducted a hearing and subsequently issued its award affirming the Board's decision on July 18, 2002.

On October 18, 2002, Myers filed a petition in Superior Court in California before the Honorable Alan Buckner, asking that court to "vacate and reverse [the] arbitration award rendered against [Myers] and in favor of ASCAP." (*Id.* at 4.) The petition attacks the composition of the Board, its conduct of the hearing on Myers' protest, the Board's decision, the conduct of the hearing before the Panel, and the arbitration award itself. (*Id.*) ASCAP moved to dismiss Myers' California proceeding for lack of subject matter jurisdiction and improper form. Apparently the parties stipulated to suspend prosecution of the Superior Court matter to permit this Court to first determine the

issue of jurisdiction. (Letter from Cyrlin to Judge Conner of 1/9/03, at 3.) Judge Buckner accordingly issued an Order deferring proceedings in that action, but thereafter granted ASCAP's motion to dismiss on the ground of improper forum.[2] ASCAP now asks this Court to confirm the Panel's award and enter judgment accordingly, dismissing Myers' complaint against ASCAP.

---

[2] According to Myers' attorney, Alan I. Cyrlin, Judge Buckner inadvertently granted ASCAP's motion to dismiss, apparently unmindful of his own Order deferring proceedings in the action. Myers has thus requested that ASCAP enter into a joint request that Judge Buckner vacate his Order so that this Court may first rule on the issue of whether this Court has exclusive jurisdiction. Myers has indicated that if ASCAP does not join in that request, it will file a motion for reconsideration. (Letter from Cyrlin to Judge Conner of 1/9/03, at 3.)

ASCAP attorney Richard H. Reimer in a letter to this Court dated January 9, 2003 states that at the hearing before Judge Buckner, ASCAP's counsel, Kurt Fritz of the California office of Arnold & Porter did not argue the merits of ASCAP's motion to dismiss Myers' state court petition. (Letter from Richard H. Reimer to Judge Conner of 1/9/03, at 1.) Mr. Fritz rather told the court that he was appearing merely with respect to ASCAP's application for Mr. Reimer's *pro hac vice* admission. Judge Buckner responded that "[t]his is a little more than a motion for admission *pro hac vice*," and proceeded to explain why he was striking Myers' petition. According to Mr. Reimer, at the time, Judge Buckner had before him ASCAP's motion papers, Myers' petition and ASCAP's response thereto and was thus able to determine that, at least in his judgment, this Court has exclusive jurisdiction and Myers was thus proceeding in an improper forum. (*Id.*) Mr. Fritz has advised Mr. Cyrlin that ASCAP will not stipulate to vacating Judge Buckner's Order, although if Mr. Cyrlin wishes to move for such relief on Myers' behalf, he may represent that ASCAP will not oppose the motion. (*Id.* at 2.)

DISCUSSION

I. Legal Standard

"Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997). Under the FAA, "a party wishing to confirm an arbitration award may apply to the court for a confirmation order any time within one year 'and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in 9 U.S.C. § 10 and 9 U.S.C. § 11.'" *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984). "The confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the Court." *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). Hence, "the showing required to avoid summary confirmation is high." *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987). "Absent a statutory basis for modification or vacatur, the district court's task . . . [is] to confirm the arbitrator's final award as mandated by section 9 of the Act." *Id.* The FAA lists the specific grounds upon which and award may be vacated. *See* 9 U.S.C. § 10(a).

II. Federal Jurisdiction

Before considering the merits of ASCAP's motion, this Court must first consider whether it has the requisite jurisdiction over the matter. In its letter to the Court dated January 15, 2003, ASCAP maintains that this Court

retains jurisdiction over the instant action for the following reasons:

> Mr. Myers's protest was heard by the Board of Review on July 17-18, 2001, prior to September 11, 2001, when the 1960 Order was vacated; both ASCAP and Myers agreed that the proceedings below were to be conducted pursuant to the 1960 Order and the Articles of Association as they existed at the time of the Board of Review hearing; and, both the Board of Review and Panel were required to interpret the specific language of the Weighting Rules and Weighting Formula set out as attachments to the 1960 Order.

(Letter from Charap to Judge Conner of 1/15/03, at 3.)

We conclude that federal subject matter jurisdiction exists based on this Court's continuing jurisdiction under the Amended Final Judgment, the 1960 Order and amending Orders thereto, entered in *United States v. ASCAP* and in effect at least as of the date of the hearing on Myers' Protest before the ASCAP Board. *See generally United States v. ASCAP (Zekley)*, 442 F.2d 601 (2d Cir. 1971); *United States v. ASCAP (Karmen)*, 32 F.3d 727 (2d Cir. 1994); *United States v. ASCAP (Warren)*, 129 F.Supp.2d 327 (S.D.N.Y.).

III. Conflicts of Interest

Myers claims that it was inappropriate for Carol Witschel to serve a dual role as both counsel for ASCAP and as secretary to the Board. (Resp't Mem. Opp. Mot. Confirm at 18.) We have considered this argument before and have concluded that it is without merit. *See U.S. v. Am. Soc. of Composers, Authors and Publishers*, 129 F.Supp.2d

327, 338-39 (S.D.N.Y. 2001). There we held that ASCAP's in-house and outside counsel had no conflict of interest requiring them to recuse themselves from representation of ASCAP in a member's grievance proceeding. Were we to hold otherwise, "it would force ASCAP attorneys to recuse themselves from all member protests and require new attorneys to familiarize themselves with the governing documents and internal workings of ASCAP in order to effectuate a meaningful representation of the Society." *Id.* at 339. Furthermore, this is not a typical conflict of interest scenario because there is no indication that Ms. Witchel ever represented Myers prior to his protest. *Id.* Myers also argues that Mary Jo Mennella's position as Chair throughout the Board hearing presented a conflict of interest because she was formally a high-ranking official of ASCAP. (Resp't Mem. Opp. Mot. Confirm at 19.) Again, we find nothing improper in Ms. Menella's [sic] role as chairperson. Ms. Mennella's prior association with ASCAP likely means that she too is familiar with ASCAP's internal workings which would facilitate her functioning as a member of the Board.

IV. Improper Appeals by ASCAP Counsel

Myers argues that ASCAP improperly appealed to the Board members' pecuniary interests, which corrupted their decision. (Resp't Mem. Opp. Mot. Confirm at 19.) Specifically, Myers suggests that ASCAP improperly reminded Board members that if it were to find in favor of Myers' interpretation of the term "background vocal," "there would be less money to share with other members of ASCAP, including the members on the Board (who were members of ASCAP and received royalty payments from ASCAP)." *Id.* It surely did not come as a surprise to the

Board members to learn that the distributions to all ASCAP members came from the same finite "pot" and that increasing the share of one distributee diminishes the share of all the others. Even if such a consideration did influence the decision of the Board, we could not deem the influence inappropriate. *See Gouveia v. INS*, 980 F.2d 814, 819 (1st Cir. 1992) (court will not "second-guess the Board on the manner in which it weights different factors when arriving at its ultimate decision").

V. Manifest Disregard of the Law

Myers contends that the Board and the Panel manifestly disregarded the law where they characterized his musical works under the Weighting Rules and Weighting Formula as background instrumentals when they should have been classified as background vocals. (Resp't Mem. Opp. Mot. Confirm at 20-21.) In order to overturn an award on the basis of manifest disregard of law, one must show "more than error or misunderstanding with respect to the law." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). Instead, "[t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it." *Id.* at 933; *see also Branigan v. Alex. Brown & Sons, Inc.*, 978 F. Supp. 547 (S.D.N.Y. 1997). The governing principles in this matter appear to be the classification terms under the Weighting Rules which

ASCAP applies in characterizing musical cues.[3] (Resp't Mem. Opp. Mot. Confirm at 20.) That the Panel was aware of this classification scheme and based its decision on the interpretation of these terms is evident from the transcript of the arbitration hearing. (Transcript of Arbitration Hearing at 131, 132, 135, 139-40.) Moreover, in their award, the arbitrators state that the Board "properly designated the works at issue as 'background,' *as opposed to the other options listed in Paragraph A of the Weighting Formula.*" (Decision of Arbitrators of 1.) Thus it is clear the Panel considered other classifications, including "vocal performance" in ruling that the Board had not mischaracterized the musical cues at issue.

Myers further argues that the Board was misled into believing that "feature performances" was the proper test under the Weighting Rules and the Panel, in "refusing to review this issue, rubber-stamped the Board's interpretation." (Letter from Myers to Judge Conner of 1/9/03 at 2.) We disagree. The classification Myers advances, "vocal performance," was discussed extensively after the Panel listened to Myers' musical cues. (Transcript of Arbitration Hearing at 87-94.) Although Mr. Reimer, counsel for ASCAP directed much of this discussion, it is clear that the Panel was interested by seeking clarification concerning the definition of "vocal performances."[4] Because the

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[3] Pursuant to section 7(a) of the Weighting Rules, the following musical classifications, among others are defined, "Background Music," "Feature Performance," "Visual Instrumental Performance," "Vocal Performance" and "Musical Subject Matter."

[4] For example, the following dialogue took place between Mr. Reimer and Ms. Lepera, one of the arbitrators:

(Continued on following page)

Panel considered the various classifications set forth in the Weighting Rules in determining that Myers' works did not fall within the designation of "background vocals," it cannot be said that the Panel manifestly disregarded the law in reaching this conclusion.

VI. Panel's Standard of Review

Myers' final argument claims that the Panel applied the wrong standard of review and improperly refused to permit Myers to present any new evidence or arguments. (Mem. Opp. Mot. Confirm at 22.) Myers also argues that the Panel erred by permitting ASCAP to introduce videotapes of the musical cues at issue. (Letter from Cyrlin to Judge Conner of 1/9/03 at 3.) The Panel's letter to the parties of April 23, 2002 accurately describes the nature of review by the Panel in proceedings such as this:

> As held in *United States v. ASCAP*, 708 F. Supp. 95 (S.D.N.Y. 1989), the Panel functions as an appellate body in the arbitral context and thus will

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MR. REIMER: If you look at the various provisions, you see, for an example, that there is a very precise definition of something called a vocal performance, "The performance of the lyrics of a composition or the on camera humming or whistling of the music of a composition." You know, I asked Sally Steven, Mr. Myers' vocalist, "were you ever on camera?" She said, "No."

MS. LEPERA: That says vocal performance, though, it doesn't say background vocal performance. So if you get a cue that says "background vocal" and you have the presumption it goes into feature credit or – and then you look at it and you say no, it doesn't because why, that's what I am trying to get at.

(Transcript of Arbitration Hearing at 140.)

> engage in a limited trial de novo in which it will not rehear eveidence that was submitted to the Board of Review but is permitted "to re-evaluate the factual findings of the Board and to receive any evidence that was improperly excluded in the proceedings of the Board." The Panel therefore will take new evidence (evidence that was not submitted to the Board of Review) only if the evidence was improperly excluded at the Board of Review.

(Letter to Parties from Panel of 4/23/02 at 1.)

The videotapes were certainly part of the evidence that was submitted to the Board and a review of the transcript of the hearing indicates that they played at least some part in the Board's classification of Myers' works as background performances.[5] The Panel, in viewing the videotapes, was merely reviewing the record before the Board in order to evaluate its factual findings and not engaging in a forbidden de novo hearing of evidence. Moreover, because Myers did not present any new evidence or arguments to the Panel that was improperly excluded at the Board hearing, the Panel did not err in refusing to hear such evidence.

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[5] For example at one point during the hearing, Mr. Reimer presented three cues from an episode that received background credit followed by a cue that received feature credit. This presentation elicited questions from the Board as to why these cues received their respective classifications. (Transcript of Board of Review Hearing at 225-28.)

CONCLUSION

For the reasons stated above, applicant's motion to confirm the arbitration award is granted.

SO ORDERED.

Dated: June 4, 2003
White Plains, NY

/s/ William C. Conner
Senior United States
District Judge